

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANTHONY S. LOEWEN

Claimant

VS.

LANDOLL CORP.

Respondent

AND

UNITED WISCONSIN INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,059,430

ORDER

Respondent and its insurance carrier (respondent) request review of the April 4, 2012 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders (ALJ).

ISSUES

The ALJ found that claimant is entitled to medical care and the respondent should provide him with the names of two physicians from which to choose an authorized treating physician for claimant's Post Traumatic Stress Disorder (PTSD) and mental health conditions caused by having witnessed his brother's on the job death. The ALJ also found that claimant is entitled to temporary total disability benefits (TTD) from January 20, 2012 until February 12, 2012 and then March 14, 2012, and continuing until claimant is released to return to work with restrictions or has reached maximum medical improvement.

Respondent appeals arguing that claimant did not sustain personal injury arising out of and in the course of his employment. Respondent contends claimant failed to carry his burden of proof in establishing a compensable mental injury as his symptoms of depression, anxiety, sleep disturbance and flashbacks all stem from witnessing what occurred to his brother rather than from any physical injury. Respondent requests that the Board deny mental health treatment and TTD benefits.

Claimant argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

On January 20, 2012, claimant's brother died as a result of an accident on the job while working for respondent when a 1200 pound piece of steel fell on top of him. Claimant sustained a physical injury to his low back trying to lift the piece of steel tubing off of his brother. Along with the physical injury to his low back, claimant also claims to have suffered a mental injury (PTSD) in the form of depression and anxiety stemming both from witnessing the death of his brother, and from the back injury suffered while attempting to lift the steel tubing off of his brother.

Claimant testified that he had no help lifting the steel piping off of his brother and as a result developed problems with his back within two days of the accident. Claimant is receiving treatment for those back problems with Chris Ampish, PT and Julia Hammett, ARNP. Claimant's treatment has been limited to physical therapy, pain medication and treatment modalities.

Ms. Hammett indicated that claimant is physically ready to return to work, but not mentally or emotionally ready to return to work. Claimant testified that he has developed anxiety and emotional problems as a result of the accident. Claimant is seeing a therapist and is taking Lexapro for depression, a generic for Ativan for anxiety, and Flexeril and Naprosyn for his back. He was referred for physical therapy three times a week. Claimant testified that he has pain from his shoulder blades all the way down into his back.

Claimant was examined, as a self referral, by nurse practitioner Cheri E. Shanks, with the office of Kenneth Duensing, D.O. He was diagnosed with thoracic and lumbar back strain secondary to the lifting incident with respondent. He was also diagnosed with PTSD secondary to his brother's death and the witnessing of the death, and with anxiety and depression. Claimant had a history of anxiety and depression for which he had been treated at the Pawnee Mental Health Clinic. Claimant had been doing well with his depression until the fatal accident. Claimant reported great anxiety since his brother's death. Claimant expressed fear at the thought of returning to work because of his concern that something might happen to him, similar to what happened to his brother. It was recommended by Ms. Shanks that he continue treating with the clinic.

Claimant doesn't believe he will be able to return to work because mentally and emotionally he is not ready to deal with what happened. Claimant at first denied having prior depression problems. But, on cross examination, admitted to prior problems with depression. From a physical standpoint, claimant has been released to return to work. Ms. Hammett released claimant to return to work on February 29, 2012, with a lifting restriction of 25 pounds. She also opined that claimant's PTSD would still prohibit claimant from returning to work.

Melony Jueneman, HR assistant of benefits administration for respondent, testified that she handles workers compensation related issues for respondent. Ms. Jueneman testified that claimant didn't immediately report to her that he needed medical treatment, but once he did she sent him to a physician. She also stated that from a physical standpoint, there is work available that claimant can perform within the 25 pound lifting restriction placed on claimant.

The ALJ granted claimant medical care with respondent being ordered to provide the names of two qualified physicians from which claimant was to designate an authorized treating physician to treat claimant's mental health conditions. Claimant was also awarded TTD until released to return to work and has been offered accommodated work or has attained maximum medical improvement or until further Order of the Court.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 2011 Supp. 44-501b, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

¹ K.S.A. 2011 Supp. 501b and K.S.A. 2011 Supp. 44-508(h).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2011 Supp. 501b(b).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁴

It is not disputed in this matter that claimant was injured on January 20, 2012, while attempting to lift a pipe off of his seriously injured brother. It does not appear to be disputed that claimant suffered a back injury as the result of that incident. The dispute herein centers around claimant’s alleged mental health concerns and the need for treatment of those conditions. Claimant alleges the need for mental health treatment stems from both the low back injury and the witnessing the death of his brother. Respondent contends the evidence ties claimant’s ongoing need for mental health treatment to both a pre-existing condition for which claimant had earlier been treated and from witnessing the fatal accident involving his brother. But, respondent contends the need for mental health treatment is not due to any physical injury suffered by claimant while employed for respondent.

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. “It is firmly established in this jurisdiction that traumatic neurosis, following physical injury and shown to be directly traceable to the injury, is compensable under the Workmen’s Compensation Act.”⁵ However, the Court in *Berger* cautioned:⁶

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.⁷

The Supreme Court, in *Followill*⁸ discussed at great length the elements required to attach workers compensation liability to a traumatic neurosis claim. In *Followill*, the claimant suffered no physical injury, but experienced the death of a co-worker in an accident. The claimant did not witness the accident but arrived moments later to a grisly

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁵ *Boutwell v. Domino’s Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998); citing *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 412 P.2d 986 (1966).

⁶ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973).

⁷ *Berger* at 550.

⁸ *Followill v. Emerson Electric Co.*, 234 Kan 791, 674 P.2d 1050 (1984).

scene. The claimant in *Followill* was unable to return to work because of his fear of machinery. The Court held that traumatic neurosis must be directly traceable to the injury in order to be compensable. The Court in *Followill* noted the language in the Kansas Workers Compensation Act (Act) involving K.S.A. 44-508(d) and (e) had not changed since their adoption in 1974. That language read as follows:

(d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workmen's compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

(e) 'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

However, since *Followill*, the Kansas legislature has seen fit to significantly modify the statute. The language now reads as follows:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

...
(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

It is evident that the legislature intended to expand the requirements necessary to prove both an accident and personal injury under the revised 2011 version of the Act. This new language appears to increase claimant's burden when alleging traumatic neurosis following an accident. As noted in *Followill*, the traumatic neurosis must be directly traceable to the injury in order for the neurosis to be compensable.

In *Berger* the claimant sustained an injury to his eye, resulting in the loss of useful vision of one eye. The physical injury led directly to the neurosis. In *Boutwell*, the claimant, a delivery worker for Domino's Pizza was attacked in an attempted robbery, receiving nine knife stab wounds. The Board found *Boutwell* suffered post-traumatic stress disorder which stemmed directly from the stabbing. Dr. J. Luis Ibarra, claimant's treating

psychiatrist, noted that *Boutwell* suffered from post-traumatic stress disorder stemming from the knife attack.

The Court in *Rund*⁹ stated “Berger stands for the proposition that traumatic neurosis following physical injury, and shown to be *directly traceable* to such injury, is compensable under the workmen’s compensation Act.”¹⁰ The analysis noted that while the claimant’s emotional problems had become more intense as the result of the accident, there was no finding that the claimant’s emotional problems were *directly traceable to the work being performed* by the claimant at respondent’s plant or to the accident.”¹¹

Here, claimant suffered a physical injury to his low back while trying to lift the pipe off his brother. However, the medical documentation fails to support a finding that claimant’s PTSD was caused or is directly traceable to that accident and the low back injury. Instead, the medical documentation supports a finding that claimant’s PTSD stems from the horror of witnessing his brother’s death when the pipe fell on him. The PTSD is directly traceable to the accident which happened to his brother, but not the accident which happened to claimant. This is even more true with the rigid new legislation which omits compensation for aggravations, accelerations or exacerbations of preexisting conditions.

This Board Member finds that claimant has failed to prove that his ongoing need for treatment for his mental health conditions stems from a personal injury which arose out of and in the course of his employment with respondent. Rather, it stems from his having witnessed his brother’s traumatic death. The April 4, 2012 Preliminary Hearing Order is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove by a preponderance of the credible evidence that his ongoing need for mental health treatment is directly traceable to an injury which arose out

⁹ *Rund v. Cessna Aircraft Co.*, 213 Kan. 812, 518 P.2d 518 (1974).

¹⁰ *Rund* at 827.

¹¹ *Rund* at 827-829.

¹² K.S.A. 44-534a.

of and in the course of his employment with respondent. The April 4, 2012 Preliminary Hearing Order of the ALJ is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated April 4, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge